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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANTHONY GROSSMAN, Plaintiff and Appellant, v. EDWARD SCHLOSS, Defendant and Appellant, BAYVIEW LOAN SERVICING, et al., Defendants and Respondents.	B228800 (Los Angeles County Super. Ct. No. BC427386)

APPEAL from orders of the Superior Court of Los Angeles County, John P. Shook. Affirmed.

Martin S. Friedlander for Plaintiff and Appellant.

Edward Schloss, in pro. per.; and Steven W. Kerekes for Defendant and Appellant.

No appearance for Defendants and Respondents.

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Defendant Edward Schloss appeals from the trial court's orders denying his motion to strike under Civil Code section 1714.10 and partially denying his special motion to strike under Code of Civil Procedure section 425.16 (anti-SLAPP[1] motion). Plaintiff Anthony Grossman appeals from the order regarding the anti-SLAPP motion and various other orders of the trial court. We affirm.

FACTS AND PROCEDURAL HISTORY

1. Grossman's Original Complaint

Grossman filed his original complaint against Bayview Loan Servicing, LLC (Bayview), Mortgage Electronic Registration System, Inc. (MERS), and Seaside Trustee Inc. (Seaside). The thrust of the complaint was that the defendants were attempting to conduct a wrongful foreclosure on his home. He alleged that in October 2004, he executed a note promising to pay $252,000 to the lender HomeAmerican Credit, Inc., doing business as Upland Mortgage. The note was secured by a deed of trust on real property located in Reseda, California. The deed of trust identified MERS as the nominee for the lender and the beneficiary under the deed of trust. Grossman defaulted on the note in or around September 2008.

The deed of trust was allegedly assigned several times, the last assignee being Bayview. Grossman alleged that the assignment to Bayview was defective. Nevertheless, he allegedly wrote many letters to Bayview requesting a loan modification to no avail. A notice of default was recorded on August 24, 2009, by Seaside, acting as "the original trustee, the duly appointed substituted trustee, or [the] agent for the trustee or beneficiary" under the deed of trust. A notice of trustee's sale soon followed and indicated that Seaside would put the home up for public auction on December 16, 2009. Grossman filed suit against Bayview, MERS, and Seaside on December 4, 2009. He alleged that the original lender was in bankruptcy, and while he did not know exactly who possessed the original note, none of the defendants

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[1] Strategic lawsuit against public participation.

possessed it, nor were they the payees on the note. He alleged therefore that none of the defendants could legally enforce the note and foreclose on his home.

Bayview, MERS, and Seaside moved for judgment on the pleadings on all nine causes of action in the complaint, and the court granted the motion with leave to amend as to all causes of action except the second.

2. The First Amended Complaint (FAC) and the Allegations Against Schloss

Grossman filed the FAC on July 23, 2010, and included allegations against Schloss. Schloss was the attorney for Bayview and Seaside. A few days after Grossman filed his original complaint, he filed and recorded a lis pendens regarding the real property at issue. Schloss received a copy of the lis pendens and the complaint as attorney for Bayview and Seaside.

The FAC alleges as follows: Grossman's counsel advised Schloss of various problems in the chain of title to Bayview and showed him where the assignment to Bayview had been defective. Grossman's counsel and Schloss agreed, on or around February 19, 2010, to postpone the trustee's sale of the subject property and "attempt to work out the title difficulties preparatory to settlement discussions." In breach of that agreement, Schloss counseled his clients and conspired with them to correct the defect in title by committing fraud. Specifically, Schloss counseled and caused Seaside to prepare a new, backdated assignment, wherein MERS as nominee for the original lender assigned both the note and deed of trust to Bayview. Schloss used the title analysis and the assignment instrument that Grossman's counsel provided to him in settlement discussions to cause Seaside to create the fraudulent assignment. The new assignment was recorded March 8, 2010, and was backdated to June 10, 2009. Seaside conducted a "secret" trustee's sale of the subject property on March 9, 2010. An entity called Pro Value Properties, Inc. (Pro Value), purchased the property. Pro Value thereafter filed an unlawful detainer action against Grossman.

3. Motion Practice Regarding the FAC

For our purposes, Grossman alleges only two pertinent causes of action against Schloss -- one for breach of the oral promise to postpone the trustee's sale (sixth cause

of action), and one for slander of title (eighth cause of action) for recording the allegedly backdated assignment, conducting the trustee's sale, and recording a deed of sale in favor of Pro Value.

Schloss filed a motion to strike the FAC on the ground that Grossman did not follow the procedures set forth in Civil Code section 1714.10 for pursuing a claim of civil conspiracy against an attorney. The court denied the motion to strike, ruling that Grossman had pled facts showing his claims fell within the "independent legal duty" exception of section 1714.10. Moreover, the court rejected Schloss's alternative argument that the "agent immunity rule" precluded Grossman's claims.

Bayview and Seaside demurred to the first through eighth causes of action in the FAC. The court sustained the demurrers to all causes of action without leave to amend, except as to the sixth and eighth causes of action. It overruled the demurrers to the sixth and eighth causes of action for breach of promise to postpone the trustee's sale and slander of title, respectively.

Schloss then filed an anti-SLAPP motion to strike the sixth and eighth causes of action. The court granted the anti-SLAPP motion to strike the cause of action for breach of promise to postpone the trustee's sale. It reasoned that Grossman based the claim primarily on Schloss's alleged representations during settlement discussions, and such conduct was protected activity under the anti-SLAPP statute. Moreover, Grossman had failed to demonstrate a probability of prevailing on the claim. The court denied the anti-SLAPP motion to strike the slander of title claim, however. It held that this claim was based on the recordation of the assignment and the trustee's deed of sale, and Schloss had failed to show that this conduct constituted protected activity.

Schloss timely appealed from the orders regarding his anti-SLAPP motion and motion to strike under Civil Code section 1714.10. Grossman timely appealed from the order regarding the anti-SLAPP motion and also identified a number of interlocutory orders from which he was appealing, including:

(1) the order sustaining without leave to amend Bayview's and Seaside's demurrers to the first through fifth and seventh causes of action;

(2) an order of the court denying his ex parte application for permission to file a surreply brief to the defendants' demurrers and motions to strike;

(3) an order of the court vacating a prior order that related this case to the unlawful detainer action by Pro Value against Grossman, and denying Grossman's motion to consolidate the two cases;

(4) the order granting Bayview's and Seaside's motion for judgment on the pleadings as to the original complaint.

STANDARD OF REVIEW

"'Review of an order granting or denying a motion to strike under [Code of Civil Procedure] section 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based."'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

We also review an order granting or denying a motion to strike under Civil Code section 1714.10 de novo. (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 822.)

DISCUSSION

1. Schloss's Appeal

A. The Trial Court Did Not Err in Denying the Motion to Strike Under Civil Code Section 1714.10

Civil Code section 1714.10, subdivision (a) prohibits the unauthorized filing of an action against an attorney for civil conspiracy with a client arising from any attempt to contest or compromise a claim or dispute. To file such an action, the plaintiff must first commence a special proceeding whereby the court will determine whether the plaintiff has established a reasonable probability of prevailing in the action. (*Ibid.*) The plaintiff must file a verified petition accompanied by the proposed pleading and supporting affidavits stating the facts upon which the attorney's liability is based. The court then orders service of the petition on the attorney and permits the attorney to

submit opposing affidavits. (*Ibid*.) The court will then determine whether the plaintiff has demonstrated a reasonable probability of prevailing against the attorney. If the plaintiff has carried this burden, then he or she is permitted to file the complaint alleging civil conspiracy against the attorney. (*Ibid.*)

Certain exceptions to this special proceeding exist. Under subdivision (c) of Civil Code section 1714.10, the section does not apply to a cause of action against an attorney for civil conspiracy with a client when "(1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain."

Preliminarily, we note that although the FAC does not allege a cause of action for "civil conspiracy," the allegations are susceptible to such an interpretation, and it is the substance of allegations, not their labels, that govern whether Civil Code section 1714.10 is relevant. (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, *supra*, 131 Cal.App.4th at pp. 823-824.) The statute applies to allegations that seek to make an attorney civilly liable with the attorney's client for the plaintiff's alleged injuries, which is what Grossman alleges here. (*Ibid.*) We thus presume that the claims against Schloss fall within the initial scope of section 1714.10, subdivision (a).

Schloss filed a motion to strike the FAC on the ground that Grossman had failed to follow the prefiling procedure outlined in Civil Code section 1714.10, and even if he had done so, he could not demonstrate a probability of prevailing against Schloss. We agree with the trial court that Grossman's claims against Schloss were exempted from the requirements of section 1714.10 under the "independent legal duty" exception.

The attorney-client relationship is one of agent and principal. (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 69 (*Shafer*).) "'"An agent or employee is always liable for his own torts, whether his employer is liable or not."' [Citations.] 'In other words, when the agent commits a

tort, such as . . . fraud . . . , then . . . the agent [is] subject to liability in a civil suit for such wrongful conduct.'" (*Id.* at p. 68.)

"'Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable . . . , the same activities by a lawyer in the same circumstances generally render the lawyer liable . . . .'" (*Shafer, supra,* 107 Cal.App.4th at p. 69.) Thus it is that "attorneys, like anyone else, have an independent duty to avoid" committing fraud when acting as agents of their clients. (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, *supra*, 131 Cal.App.4th at p. 825.) "'A lawyer communicating on behalf of a client with a nonclient may not . . . [¶] . . . knowingly make a false statement of material fact . . . to the nonclient . . . .'" (*Shafer*, *supra*, at p. 69.) "'If an attorney commits actual fraud in his dealings with a third party, the fact he did so in the capacity of attorney for a client does not relieve him of liability. [Citation.] While in general an attorney's professional duty of care extends only to dealings with his own client and to intended beneficiaries of the legal work performed, these limitations upon liability for negligence . . . do not apply to liability for fraud.'" (*Ibid*.) "In California it is well established that an attorney may not, with impunity, either conspire with a client to defraud or injure a third person or engage in intentional tortious conduct toward a third person. [Citation.] [¶] Thus, the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

California courts have applied the foregoing well-established principles to exempt claims of conspiracy to defraud from Civil Code section 1714.10. In *Shafer*, the plaintiffs alleged that the defendant attorney had conspired with a client to commit fraud and stated claims against him for fraud and civil conspiracy. (*Shafer, supra*, 107 Cal.App.4th at p. 66.) Because attorneys have an independent legal duty not to defraud another, the court in *Shafer* held that the plaintiffs' conspiracy claim was exempt from section 1714.10. (*Shafer, supra*, at p. 84.) Likewise, in *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 396-397, the court held that the claimant could

state a claim against an attorney for conspiring with his clients because the attorney had an independent "duty to [the claimant] to not commit fraud," and the pleading alleged that the attorney had made express misrepresentations to the claimant. *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 210, ruling that "an attorney has 'an independent legal duty' not to defraud individuals engaged in business transactions with his or her client," also held that a conspiracy claim against an attorney based on an alleged fraudulent scheme was exempted from section 1714.10.

Accordingly, Schloss is incorrect when he contends that he owed no independent legal duty to Grossman and he therefore should have prevailed under Civil Code section 1714.10. Schloss owed an independent legal duty to Grossman not to defraud him. The FAC alleges that Schloss committed a "promissory fraud" by agreeing to postpone the trustee's sale when he had no intention of doing so, which is a type of fraudulent misrepresentation. (*Cicone v. URS Corp.*, *supra*, 183 Cal.App.3d at p. 201 ["[A] promise material to the contract which is made without any intention of performing it is deemed a misrepresentation of fact."].) Moreover, the FAC alleges that, in reliance on this agreement, Grossman's counsel provided Schloss with the documents in settlement discussions that enabled Schloss and his clients to prepare and record a backdated assignment and then conduct a "secret" trustee's sale. These allegations of an alleged fraudulent scheme exempt the claims against Schloss from the requirements of section 1714.10 under the "independent legal duty" exception. (Civ. Code, § 1714.10, subd. (c).)

Schloss's reliance on the "agent's immunity rule" and cases such as *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39 and *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692 does not alter our conclusion. The agent's immunity rule holds that a "cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty." (*Doctors' Co.*, *supra*, at p. 44.) *Doctors' Co.* and *Skarbrevik* both applied the agent's immunity rule to bar

claims against an attorney. (*Doctors' Co.*, at p. 49; *Skarbrevik*, at pp. 711-712.) Both cases recognized, however, that the independent legal duty exception set forth in Civil Code section 1714.10, subdivision (c), mirrors one of the exceptions to the agent's immunity rule. (*Doctors' Co.*, at p. 47; *Skarbrevik*, at pp. 709-710.) Thus, the agent's immunity rule does not shield "an attorney who conspires with a client to defraud a third party and who commits *actual* fraud in pursuit of the conspiracy . . . . In that situation, liability is premised on the breach of the attorney's personal duty to abstain from harming another by false misrepresentation, a duty independent of the client's duty." (*Skarbrevik*, at p. 711.)

Grossman's allegations bring this case within an exception to both the agent's immunity rule and section 1714.10. The trial court did not err in denying Schloss's motion to strike under section 1714.10.

B. The Trial Court Did Not Err in Denying the Anti-SLAPP Motion to Strike the Claim for Slander of Title

The anti-SLAPP statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) Thus, a court's task in ruling on an anti-SLAPP motion to strike is a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity ("any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue"). (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the defendant makes such a showing, the court then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*)

Here, the trial court granted Schloss's anti-SLAPP motion as to the cause of action for breach of the oral promise to postpone the trustee's sale, but denied it as to the slander of title cause of action. We conclude that the court did not err because the slander of title cause of action does not arise from protected activity.

Under the terms of the statute, protected activity includes: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (Code Civ. Proc., § 425.16, subd. (e).) Thus, under the plain language of the statute, "as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 480.)

But the mere fact a plaintiff filed a cause of action after protected activity took place does not mean it arose from that activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) "California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.'" (*Id.* at p. 77.)

"Rather, '"the act underlying the plaintiff's cause" or "the act which forms the basis for the plaintiff's cause of action" must *itself* have been an act in furtherance of the right of petition or free speech.'" (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 66; see also *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 187 ["[T]he 'anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning'"].) The principal thrust or gravamen of the plaintiff's cause of action determines whether the anti-SLAPP statute applies. (*Martinez, supra*, at p. 188.)

In light of the foregoing, the trial court's ruling was correct. Grossman's slander of title cause of action does not arise from protected activity. Schloss contends that the cause of action is based on his allegedly counseling his client to prepare a new assignment, and as a communicative act regarding defense of the lawsuit, the conduct is protected activity. That is not an accurate view of the conduct on which the claim is based. Slander of title is the unprivileged publication of matter that is false and disparaging to another's title to property, with resulting pecuniary damage. (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 419.) Grossman's slander of title cause of action alleges that Schloss, Bayview, and Seaside recorded a backdated and false assignment of the trust deed, proceeded with the trustee's sale in secret, and then recorded a trustee's deed of sale in favor of Pro Value. The cause of action is thus based on these publications, not on communicative acts by Schloss in a judicial proceeding. Publications made in connection with a nonjudicial foreclosure are not protected activity under the anti-SLAPP statute. (*Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1522-1523.) A "nonjudicial foreclosure, by its very nature, is a private transaction." (*Id.* at p. 1516.) It does not involve legislative, executive, or judicial proceedings. (*Id.* at p. 1520.) "Although the anti-SLAPP statute must be construed broadly, the Legislature did not intend it to apply the statute to purely private transactions." (*Id.* at p. 1524.) The gravamen of the slander of title cause of action is not Schloss's counseling but the act of recording documents that allowed Seaside and Bayview to accomplish a foreclosure sale. The fact that these acts occurred after Grossman filed his original complaint, and may have been part of a plan to defend against his lawsuit, is of no moment. (See *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78 ["That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such."].) The recording of the documents and the foreclosure sale were private business events and not protected

activity under the anti-SLAPP statute. (*Garretson v. Post, supra,* at p. 1523.) The trial court did not err in denying the anti-SLAPP motion as to the slander of title cause of action.[2]

2. Grossman's Appeal

Grossman's contentions on appeal are without merit. He wholly fails to overcome the presumption of correctness applicable to trial court orders on appeal. First, he contends that the trial court erred in granting the anti-SLAPP motion on the cause of action for breach of the promise to postpone the trustee's sale. His argument is conclusory and consists entirely of a brief, five-sentence paragraph containing no legal citations or references to specific facts. Second, he contends that the trial court erred in not consolidating this case with Pro Value's unlawful detainer case against him. With the exception of three introductory sentences, this section of his argument consists only of excerpts from his proposed statement of appeal from the judgment in the unlawful detainer case, which he filed with the appellate department of the superior court. He does not show how his appeal from the unlawful detainer judgment is relevant to the consolidation of the two cases. Third, in the conclusion section of his brief, Grossman summarily contends, with no argument whatsoever, we should reverse the other orders identified in his notice of appeal, as well as: (1) reverse the judgment in Pro Value's unlawful detainer action (an action over which we have no jurisdiction in this appeal); (2) reverse the order expunging the lis pendens he recorded and filed regarding the subject property; and (3) "require all defendants in this action to file verified answers."

"Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to

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[2] In view of our conclusion that the challenged cause of action does not arise from protected activity, we need not reach the anti-SLAPP statute's secondary question -- whether Grossman demonstrated a probability of prevailing on the claim. (*City of Cotati v. Cashman, supra,* 29 Cal.4th at pp. 80-81.)

affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573; see also *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) We are "'not required to make an independent, unassisted study of the record in search of error . . . . [E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.'" (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522.) Grossman has failed to carry his burden on appeal and has essentially waived his contentions. We therefore decline to reverse the orders that he challenges.

DISPOSITION

The orders are affirmed. The parties shall bear their own costs on appeal.

FLIER, Acting P. J.

We concur:

GRIMES, J.

SORTINO, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.